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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-120

DOUGHERTY COUNTY, GEORGIA BOARD OF EDUCATION, *et al.*,
Appellants,

v.

JOHN E. WHITE

Appeal from the United States District Court for the Middle District of Georgia, Albany Division

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BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

STATEMENT

Appellee does not quarrel materially with the Statement of the Case as presented in the Brief for Appellants.

ARGUMENT

Introduction

The question presented on this appeal is whether a public school system's newly adopted rule requiring that employees must take leave without pay in order to run for, or serve in, public office, must be submitted for preclearance pursuant to Section 5 of the Voting Rights Act of 1965. (The three-judge district court held that Section 5 applies, and that the rule therefore must be submitted

for pre-clearance either to the Attorney General of the United States, or to the United States District Court for the District of Columbia in a declaratory judgment action.) This case does not involve a determination whether the rule in question has the purpose or effect of discriminating on the basis of race; initial determination of that "substantive" inquiry, under the Voting Rights Act, is the province of the Attorney General or the District Court for the District of Columbia.

I

RULE 58 OF THE DOUGHERTY COUNTY BOARD OF EDUCATION CONSTITUTES CONTROL OVER THE ELECTORAL PROCESS AND IS FOR THAT REASON A "COVERED CHANGE" WITHIN THE MEANING OF SECTION 5 OF THE VOTING RIGHTS ACT OF 1965 [1]

If the adoption by Appellant Dougherty County Board of Education on June 12, 1972 of its Rule 58 (requiring employees who run for office to take unpaid leave during their candidacy or tenure) was a "covered change" under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, then the Rule should not have been applied to Appellee until it had either been submitted and approved by the Attorney General of the United States, or declared valid and nondiscriminatory in an action brought by Appellants in the United States District Court for the District of Columbia. The question of the Act's coverage, therefore, is determinative of Appellee's right to some judicial remedy respecting Rule 58.[2]

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[1] Appellee has reversed the order of questions presented and argued by Appellants because the question of "covered entity" is readily resolved if Rule 58 is a "covered change." On the other hand, if Rule 58 is not a "covered change," then the "covered entity" issue need not be reached.

[2] It should be noted that the question of appropriate remedy was remanded by the court below to the originating single judge. Appendix [hereinafter, "App."] 36a. In his Complaint, Appellee sought declaratory and injunctive relief and also an award of back pay to compensate him for sums he allegedly lost because Rule 58 was applied to him; jurisdiction was claimed not only pursuant to the Voting Rights Act but also under 28 U.S.C. §§ 1343(3) and (4) and 1331 to enforce rights protected by 42 U.S.C. § 1983, the Fourteenth and Fifteenth Amendments to the Constitution. App. 2a-3a, 6a-7a.

This Court's decisions during the past ten years have given "the broadest possible scope" to the coverage of Section 5. In *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969), this Court interpreted Section 5 to require prior federal scrutiny of "any state enactment which altered the election law in a covered state [3] in even a minor way." *See also, Perkins* v. *Mathews*, 400 U.S. 379, 387-94 (1971). Later decisions of this Court have held that this "broad" application of Section 5 (first stated in *Allen*) has been subsequently ratified by the Congress in the 1970 and 1975 extensions of the Voting Rights Act. *E.g., Georgia* v. *United States*, 411 U.S. 526, 533 (1973); *see also, Beer* v. *United States*, 425 U.S. 130 (1976).

Most recently, the controlling principle of construction was formulated by this Court in *United States* v. *Board of Comm'rs of Sheffield*, 46 U.S.L.W. 4189 (March 6, 1978),[4] as follows:

> [Section 5 applies to] *all entities having power over any aspect of the electoral process* within designated jurisdictions, not only to counties or to whatever units of state government perform the function of registering voters. (*Id.* at 4191) (emphasis added).
>
> . . . it appears to follow necessarily that § 5 has to apply to *all entities exercising control over the electoral processes* within covered States or subdivisions. (*Id.* at 4192) (emphasis added).

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[3] As Appellants concede, there is no question that the entire State of Georgia is a "covered" State. Brief for Appellants, at 14.

[4] Hereinafer cited as *"Sheffield."*

While *Sheffield* directly involved only the "covered entity" issue, this Court's rulings since *Allen* v. *State Bd. of Elections*, *supra*, have consistently rejected the argument that there are any *de minimis* or "local matter" exceptions to the "election law change" coverage of Section 5. For example, *Allen* involved write-in procedures in connection with a change from paper ballots to machine voting; *Fairley* v. *Patterson* (decided with *Allen*), a statute authorizing county governing bodies to adopt at-large voting schemes; *Perkins* v. *Mathews*, *supra*, the location of polling places; *Hadnott* v. *Amos*, 394 U.S. 358 (1969), the date for filing notice that an individual intended to become a candidate.

As this Court noted in *Sheffield*, 46 U.S.L.W. at 4194, the fact that Section 5 coverage extends to even the most minor and subtle changes in the electoral mechanism within a "covered State" is a reflection of the constitutional underpinnings of the Voting Rights Act:

> One would expect that the substantive duties imposed in the Act, as in the constitutional provisions that it is designed to implement, would apply not only to governmental entities formally acting in the name of the State, but also to those political units *that may exercise control over critical aspects of the voting process.* (emphasis added.)

Just as the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination," *Lane* v. *Wilson*, 307 U.S. 268, 275 (1939), so Section 5 coverage attaches to any enactment controlling the electoral process, whether or not it is called a "voting" change.

Rule 58 Addresses the Electoral Process

Appellants argue that the Dougherty County Board of Education's Rule 58 is a personnel policy, not a regulation of the electoral process, and is therefore not subject to the

Voting Rights Act. But even if a regulation is intended to accomplish some permissible purpose outside the sphere of candidacy and voting, it is subject to Section 5 if it constrains the electoral process. *See, e.g., Perkins* v. *Mathews*, *supra*. Moreover, the assertion that Rule 58 is simply "a means of getting a full day's work for a full day's pay—nothing more and nothing less," Brief for Appellants, at 20, is supported neither by the language of the Rule nor by the purported justification for its adoption.

On its face, Rule 58 addresses the conditions under which an individual who happens to be an employee of the Dougherty County Board of Education may stand for office; it says nothing about "a day's work for a day's pay." App. 3a-4a, 9a (#5). The fact that Rule 58 requires *elected* but not appointed public officials to take leave without pay also is inconsistent with Appellants' argument that it was adopted as a personnel measure. Nor was it adopted because the Board had experienced problems because of absences from duty on the part of staff participating in political campaigns. Appellee is the *only* employee who has ever run for office, App. 12a, 16a (#5); the announced justification for the rule did not include any reference to problems with Appellee or any other employee in connection with political campaigns or public service, App. 12a, 14a (#4). Instead, Appellants claim only that

> . . . the Board of Education deemed it necesary to have a rule which would set forth the policy of the Board pertaining to personnel within the school system *offering for elective office and serving in an elective office if elected thereto.*

App. 16a (#4) (emphasis added). Under these circumstances, the characterization of Rule 58 as a "personnel policy" no more avoids Section 5 coverage than did the claimed justifications that inadequate space required a

change in polling places, *see Perkins* v. *Mathews*, 301 F. Supp. 565, 568 (S.D. Miss. 1969), *rev'd* 400 U.S. 379 (1971), or that the possibility of "disruption" necessitated a change in the permissibility of electioneering between 50 and 500 feet from the polls, *see Clayton* v. *North Carolina State Bd. of Elections*, 317 F. Supp. 915, 920-21 (E.D.N.C. 1970) (three-judge court).

There are ample means available to Appellant Board of Education, which has its employees under contract, to enforce its right to obtain "a full day's work for a day's pay." For example, if it has not already done so, the Board may adopt policies governing absences from school grounds during working hours—both with and without leave. What it may not do, however, without prior approval of the Attorney General or the United States District Court for the District of Columbia, is to adopt a Rule explicitly addressing itself to the electoral process.[5]

[5] The extent to which Rule 58 can be justified as a nonracial personnel regulation is also relevant to the substantive question to be determined by the Attorney General or the United States District Court for the District of Columbia; the purpose of the Voting Rights Act's pre-clearance requirement was to avoid the necessity of case-by-case adjudication. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 313-14 (1966); *Sheffield*, 46 U.S.L.W. at 4191-92. Although this Court need not pass on the issue, it should not be overlooked that there are substantial reasons why Rule 58 is suspect.

First, the Rule was adopted within a month after Appellee had announced his initial candidacy for a legislative seat. Second, the Board had no experience suggesting that employee participation in election campaigns would causes absences from duty. No Board of Education employee had previously run for office. Third, there is a history of racial discrimination affecting voting in Dougherty County. For instance, in 1972 when Appellee first stood for office, legislative elections were on an at-large basis. The Attorney General eventually objected under Section 5 to this districting scheme and ultimately the General Assembly of Georgia adopted a modified plan which provided for a single-member district, for which Appellee campaigned successfully in 1974. *See* U.S. Comm'n on Civil Rights, THE VOTING RIGHTS ACT: TEN YEARS AFTER (1975), at 230-34. Regarding recent voting rights litigation in the City of Albany, the

Because Rule 58 Is a Barrier to Access to the Electoral Process, It Is a Covered Change Under Section 5

An analysis of this Court's Section 5 rulings demonstrates that one indicator of a "covered change" is that it increases the difficulty of obtaining access to a position on the ballot. In *Whitley* v. *Williams* (a companion case decided with *Allen* v. *State Bd. of Elections*, *supra*), this Court held that Section 5 coverage extended to changes which "appear aimed at increasing the difficulty for an independent candidate to gain a position on the general election ballot." 393 U.S. at 570. This "Whitley rule" was subsequently applied in *Hadnott* v. *Amos*, *supra*, which involved changes in the filing deadlines for independent candidates. In *Hadnott* this Court ruled that "[t]he increased barriers placed on independent candidates by Alabama's Garrett Act likewise bring it within the purview of § 5 of the Federal Act." 394 U.S. at 366. *See also*, *Sumter County Executive Comm.* v. *Dearman*, 514 F.2d 1168 (5th Cir. 1975).

This Court has consistently recognized that the character of regulations which touch upon the electoral process

county seat of Dougherty County, *see Paige* v. *Gray*, 339 F. Supp. 459 (M.D. Ga. 1975), *vacated*, 538 F.2d 1108 (5th Cir. 1976), *on remand*, 437 F. Supp. 137 (M.D. Ga. 1977). Finally, the Attorney General or the U.S. District Court should consider the extent to which, historically, public school teaching has been one of the few professions open to Blacks in Georgia, so that a rule like the one in issue here has a far greater impact upon potential educated, articulate Black candidates than upon whites. For example, the 1970 Census reported that of 208,433 Georgia residents whose occupations fell into the "professional" classification, 53.8% of the Blacks were employed as elementary and secondary school teachers, compared to only 21.2% of the white "professionals." Black citizens constituted 25.2% of the State's teaching force but only 11.7% of the State's total "professional" workforce, as reported in the census. U.S. Bureau of the Census, CENSUS OF POPULATION: 1970, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, Final Report PC(1)-C12, GEORGIA, at Table 54.

must be measured realistically with a view to their impact, and that financial barriers to candidacy affect that process in a direct and forceful fashion. Thus, this Court has invalidated certain candidate qualifying fee schemes under the Fourteenth Amendment under a standard of "close scrutiny" triggered by appreciation of the practical fact that voting rights were implicated by such schemes. The Court said that an unrealistically high qualifying fee (without an alternative method for qualifying) "tends to deny some voters the opportunity to vote for a candidate of their choosing; at the same time, it gives the affluent the power to place on the ballot their own names or the names of persons they favor. . . . [W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status." *Bullock* v. *Carter*, 405 U.S. 134, 144 (1971). *See also*, *Lubin* v. *Panish*, 415 U.S. 709 (1974). Similarly, this Court has struck down property ownership requirements for public officeholding. In *Turner* v. *Fouche*, 396 U.S. 346, 362 (1970), this Court held unconstitutional a Georgia state law requiring that members of county boards of education be "freeholders" because citizens "do have a constitutional right to be considered for service without the burden of invidiously discriminatory disqualifications." *See also*, *Kramer* v. *Union Free School Dist.*, 395 U.S. 621 (1969) (right to cast ballot); *Cipriano* v. *City of Houma*, 395 U.S. 701 (1969) (same). Finally, the principle has been applied in cases challenging at-large redistricting plans as racially discriminatory. In *White* v. *Regester*, 412 U.S. 755, 765-70 (1973), this Court recognized that where there is a history of racial discrimination in voting and minority citizens have not been able in at-large contests to elect minority candidates to public office, a finding that the political processes are not equally accessible to non-minority and minority groups is appropriate and single-member-district plans may be required.

Accord, e.g., *Parnell* v. *Rapides Parish School Bd.*, 563 F.2d 180 (5th Cir. 1977); *Kirksey* v. *Board of Supervisors*, 554 F.2d 139, 142-46, 148-51 (5th Cir.), *cert. denied*, 46 U.S.L.W. 3357 (1977).

In each of its cases, as in the earlier "white primary" rulings,[6] this Court has utilized a pragmatic, not a formalistic, test to determine whether the challenged practice constituted part of the electoral process. Under the same sort of realistic, practical approach, the Dougherty County Board of Education's Rule 58 directly controls the political process by making it more difficult for at least some potential candidates to qualify. School Board employees must be willing to endure the financial sacrifice of foregoing wages during the period of campaigning and serving in an elected post. Thus, although the School Board does not conduct elections, its adoption of Rule 58 creates substantial additional burdens for potential candidates interested in running for office if they are school system employees,[7] notwithstanding the employees' ability or willingness to undertake continued full performance of their employment responsibilities.

Even though Rule 58 does not apply to all candidates for elective office, then, it does directly control elections since on its face it limits and impedes the ability of school system employees to run for elective office.[8] Thus Rule 58 is a "covered change" under Section 5.

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[6] *E.g.*, *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Terry* v. *Adams*, 345 U.S. 461 (1953).

[7] This is particularly true for Black citizens of the county. *See* note 5 *supra*.

[8] Although Appellee has in the past made the necessary financial sacrifice to stand for office, there can be no doubt that Rule 58 continues to impose a severe burden on Appellee and other school system employees faced with the decision whether to run. *Cf. Allen* v. *State Bd. of Elections*, *supra*, 393 U.S. at 553 (action challenging rule forbidding use of gummed stickers for "write-in" candidates may be maintained for prospective relief even though counting of

The Voting Rights Act Was Intended to Subject to Scrutiny Precisely the Sort of Barrier to Candidacy Imposed by Rule 58

Economic reprisals for participation in the electoral process have long been an abuse Congress has sought to eliminate. In the Civil Rights Act of 1957, Congress responded to this discriminatory practice with the enactment of 42 U.S.C. § 1971b, concerning intimidation of voters. Notwithstanding the broad judicial interpretation of this statute to encompass economic reprisals,[9] the problem persisted, as documented by the reports of the United States Civil Rights Commission. U.S. Comm'n on Civil Rights, WITH LIBERTY AND JUSTICE FOR ALL 47 (1959); [10] U.S. Comm'n on Civil Rights, VOTING 190 (1961).[11] Submitting his proposed civil rights legislation to Congress in 1963, President Kennedy specifically noted the continuing economic retaliation against Black citizens exercising their constitutional rights.[12]

In the United Sttaes Civil Rights Commission's 1975 report on the Voting Rights Act, the Commission cited

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disputed ballots in election in which rule applied would not affect result).

[9] *United States* v. *Board of Educ. of Greene County*, 332 F.2d 40 (5th Cir. 1964); *United States* v. *Beaty*, 288 F.2d 653 (6th Cir. 1961); *United States* v. *Bruce*, 353 F.2d 474 (5th Cir. 1965).

[10] "Factors that discourage or prevent Negroes from registering to vote, include in some places, the fear of bodily harm and loss of jobs."

[11] "In several counties, Negro teachers are warned to refrain from taking too active an interest in political matters upon pain of losing their jobs. An even more widespread inhibiting factor is fear of physical or economic reprisal."

[12] "Too often those who attempt to exert their constitutional rights are intimidated. Prospective registrants are fired." Message of February 28, 1963, PUBLIC PAPERS OF THE PRESIDENTS, John F. Kennedy, 1963, at 223, as quoted in *Hearings on Civil Rights before Subcommittee No. 5 of the House Judiciary Committee*, 88th Cong., 1st Sess. 927 (1963).

numerous examples of economic retaliation against teachers and school board employees participating in the electoral process. U.S. Comm'n on Civil Rights, THE VOTING RIGHTS ACT: TEN YEARS AFTER 185, 189, 191, 193-95, 197 (1975), and the legislative history of the Voting Rights Act of 1965 and the 1975 extension reflect Congressional concern over this seemingly intractable problem.[13] The general language of Section 5, and Congress' endorsement of this Court's broad construction of that provision in *Allen* and other cases, see p. 3 *supra*, thus reflect its desire to eliminate—or at the least to subject to scrutiny—any economic sanctions for political activity by minority citizens.

The Attorney General Has Interpreted Section 5 of the Act to Cover Rule 58

The conclusion that Rule 58 is a "covered change" subject to Section 5 pre-clearance is further buttressed by the administrative interpretation of the statute by the Attorney General. Pursuant to duly adopted regulations,[14] the Attorney General requested that the Dougherty County Board of Education submit Rule 58 for Section 5 preclearance. App. 28a.[15] The request was ignored by the Appellant School Board, and Rule 58 has never been submitted for Section 5 review. App. 19a (#6).

The central role of the Attorney General in interpreting Section 5 was discussed at length by this Court in *Sheffield*, *supra*, 46 U.S.L.W. at 4195; that interpretation has consistently been afforded great deference. *See Per-*

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[13] *See* H.R. REP. No. 439, 89th Cong., 1st Sess. (1965), *reprinted in* [1965] U.S. CODE CONG. & ADM. NEWS 2437, 2452; S. REP. No. 94-295, 94th Cong., 1st Sess. 26 (1975), *reprinted in* [1975] U.S. CODE CONG. & ADM. NEWS 774, 792.

[14] 28 C.F.R. §§ 51.1-51.29 (1977).

[15] Although not printed in the Appendix, the date shown on the letter request of the Attorney General is August 26, 1976. *See* App. 26a (#3).

kins v. *Mathews*, *supra*, 400 U.S. at 390-91; *Georgia* v. *United States*, *supra*, 411 U.S. at 536-41. Here, the order of the three-judge court is congruent with, and in effect enforces, the ruling of the Attorney General with respect to coverage. That Order should be affirmed.

II

THE BOARD OF EDUCATION IS A "COVERED ENTITY" UNDER SECTION 5 OF THE VOTING RIGHTS ACT

As Appellee has demonstrated above, Rule 58 is a "covered change" subject to Section 5 pre-clearance because it amounts to "control over the electoral process." Appellants also argue that the court below erred because the Dougherty County School Board is not a "covered entity." However, this Term's ruling in *Sheffield* makes clear that if Rule 58 is a "covered change," then the School Board is a "covered entity."[16] There, this Court held that all "state actors" in a covered State (or a covered political subdivision) which exercise control over the electoral process must submit such changes for pre-clearance pursuant to Section 5. The Voting Rights Act applies "territorially" within such States or subdivisions and is not limited to entities which conduct voter registration or elections.

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[16] The former question turns, as set out above, on whether Appellant Board of Education exerts "control over the electoral process" when it, *inter alia*, adopts regulations such as Rule 58. The answer is clearly that it does—and while Appellants correctly assert that no previous decision is precisely on all fours with the situation here presented, they ignore the fact that there is no reported decision sustaining the exclusion from Section 5's pre-clearance requirement of any statute, ordinance or regulation which operates to burden access to the ballot.

Under Georgia law, there is no question that the Dougherty County Board of Education is a "political subdivision" of the State. *Ty Ty Consol. School Dist.* v. *Colquitt Lumber Co.*, 153 Ga. 426, 427, 112 S.E. 561 (1922); *Seaboard Air Line Ry.* v. *Wright*, 165 Ga. 367, 371, 140 S.E. 863, 865 (1927); *Campbell* v. *Rosebud Consol. School Dist.*, 186 Ga. 541, 548, 198 S.E. 225, 229 (1938); GA. CODE ANN. § 23-1715. As Appellants frankly admit, the "Board of Education is a political subdivision [of the State] charged with the responsibility of operating the public schools of Dougherty County, Georgia." Brief for Appellants, at 14-15. As such a political entity of the State of Georgia, it is a "state actor" for Section 5 purposes.

Here, the General Assembly of Georgia has chosen to delegate to local county boards of education the authority to administer local school systems. GA. CODE ANN. § 32-901. Since *Sheffield* answers in the negative the question whether an entity must register voters to be "covered" by Section 5, and since Rule 58 is a covered change, the fact that the School Board, rather than the State, adopted Rule 58 does not defeat Section 5 coverage. *Compare Fairley* v. *Patterson*, *supra*, 393 U.S. at 550 (local option statute allowing change to at-large elections).

As this Court stated in *Sheffield*, *supra*, once a State has been designated under Section 4(a), "all political units within it are subject to the pre-clearance requirement." 46 U.S.L.W. at 4149. *See also id.* at 4197 (Powell, J., concurring). Although a school board could not be the basic unit "designated" under Section 4(a), once a State or appropriate political subdivision has been so designated, then all entities exercising formal or informal control over the electoral process therein are subject to Section 5.

This result is wholly in accord with the legislative purpose to make unnecessary tedious litigation of each electoral process change in every jurisdiction, and to "shif[t] the advantages of time and inertia from the perpetrators of the evil to its victims." *Sheffield*, 46 U.S.L.W. at 4192. If this Court were to hold that Section 5 coverage turned on whether the challenged action were only of local rather than statewide application, a basic goal of uniformity in the administration of the Voting Rights Act would be lost. The scope of federal scrutiny over the "extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination," *South Carolina* v. *Katzenbach*, *supra* note 5, 383 U.S. at 335, should not depend on the manner of a particular State's exercise, or delegation of the power to exercise, control over the electoral process. *Cf. Cooper* v. *Aaron*, 358 U.S. 1 (1958).

CONCLUSION

Affirmance of the judgment below will not subject every employment rule or practice of every school board or special-purpose district in covered States or political subdivisions to the pre-clearance requirement. Rather, the determination of Section 5 coverage turns on the specific facts of each case. *Cf. Bullock* v. *Carter*, *supra*, 405 U.S. at 149. Here, the rule in question explicitly addresses the electoral process and imposes a direct barrier to candidacy. Hence it clearly falls within the scope of Section 5. Reversal of the judgment below would insulate from scrutiny by the Attorney General even those practices of entities which, though they are neither election boards nor municipalities, may have very damaging effects upon the opportunities of Black citizens to become candidates for or serve in public office.

For these reasons, Appellee respectfully submits that the judgment below should be affirmed.

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